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No. 99-1777

In the Supreme Court of the United States

DIANA C. WESTOVER, a/k/a DIANA C. BINDLOSS,
PETITIONER

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a search that was held in criminal proceedings to have violated the Fourth Amendment rights of petitioner's fiancé or a warrantless immigration arrest of petitioner invalidates the deportation proceedings commenced against petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 202 F.3d 475. The opinion of the Board of Immigration Appeals (Pet. App. 14a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2000. The petition for a writ of certiorari was filed on May 8, 2000, and docketed on May 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a forty-one-year-old native of Tanzania and citizen of the United Kingdom. After lengthy proceedings, an immigration judge found that she was deportable because she had procured a visa to enter the United States by fraud or willful misrepresentation and because she was not in possession of a valid, unexpired visa. The immigration judge also denied petitioner discretionary relief from deportation. The Board of Immigration Appeals (BIA) upheld the immigration judge's determinations. Pet. App. 14a-28a. The court of appeals affirmed. *Id.* at 1a-13a.

1. On March 5, 1992, petitioner appeared at the Port of Entry in West Berkshire, Vermont, and informed United States Customs Inspector Jay Labier that she wanted to renew a previous non-immigrant visa that was soon to expire. She said that her additional stay would be for three or four weeks while her American fiancé was finalizing his divorce and that they would then be going to Great Britain. Inspector Labier informed petitioner that she would have to leave the United States before she could obtain a new visa. Petitioner then departed the United States for Canada for a period of ten minutes. Upon her return, she applied for a new visa. Inspector Labier, after consulting a supervisor, issued petitioner a new, six-month non-immigrant visitor visa. The new visa was to expire on September 4, 1992. Pet. App. 3a, 10a, 22a.

2. On May 7, 1992, approximately two months after petitioner's acquisition of her new visa, the Vermont State Police, acting pursuant to a warrant, searched the house petitioner shared with her then-fiancé Terence Westover. (They were married on May 21, 1992. Pet. App. 2a n.1.) Approximately 300 marijuana plants were

seized from a room near petitioner's bedroom. According to petitioner, she did not know the marijuana was in the house. *Id.* at 3a; Pet. C.A. Br. App. B, at 8-9 (Oral Decision of the Immigration Judge).

Petitioner's fiancé was arrested and charged with narcotics offenses, but the district court suppressed the marijuana, on the ground that the officers executing the warrant had failed to knock and announce their presence before entering the house. Cert. Admin. R. 532-534. Petitioner herself was transported by the Vermont State Police to their barracks. She was eventually transferred to INS custody and arrested without a warrant by INS Agent Boocock. Agent Boocock questioned petitioner and later testified that she told him she had no intention to leave the United States. Pet. App. 4a.

3. On May 7, 1992, the INS charged petitioner with deportability under Section 241(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(A) (1988 & Supp. IV 1992), for being excludable at the time of her last entry into the United States in March 1992. In turn, the excludability at entry was alleged to have occurred under Section 212(a)(6)(C)(i) of the INA, 8 U.S.C. 1182(a)(6)(C)(i) (1988), in that petitioner was an alien who by fraud or willfully misrepresenting a material fact had procured a visa or entry into the United States, and under Section 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(7)(A)(i)(I) (1988 & Supp. IV 1992), in that petitioner was an alien not in possession of a valid unexpired immigrant visa or other valid entry document.[1] Pet. App. 4a.

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[1] On September 29, 1992, the INS filed an additional charge under Section 241(a)(1)(B) of the INA, 8 U.S.C. 1251(a)(1)(B) (1988 & Supp. IV 1992), alleging that petitioner overstayed her visitor

4. On March 25, 1993, the immigration judge determined that when petitioner arrived in the United States in March 1992, she had no intent to return to a domicile abroad. Pet. C.A. Br. App. B, at 4. The judge noted that at the time of petitioner's last ten-minute departure from and return to the United States, she had been continuously living in the United States since 1987 (except for approximately two months) and had been working without authorization despite her visitor status. *Id.* at 4-5. Each time petitioner entered the United States, the judge found, she had told the INS that she was waiting for her fiancé to finalize his divorce and that she planned to marry him at a location outside the United States. *Id.* at 6. Based on that evidence, the judge concluded that petitioner was not a bona fide visitor at the time of her last arrival in the United States and therefore was now deportable for having been excludable at entry under INA Section 212(a)(6)(C) and (a)(7). *Ibid.* In the exercise of discretion, the judge also denied petitioner's applications for adjustment of status to that of lawful permanent resident under INA Section 245, 8 U.S.C. 1255 (1988 & Supp. IV 1992), and for voluntary departure under INA Section 244(e), 8 U.S.C. 1254(e) (1988 & Supp. IV 1992). Pet. C.A. Br. App. B, at 6-11.

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visa, which had expired earlier that month while the deportation proceedings were ongoing. The immigration judge and Board of Immigration Appeals ultimately sustained that charge, along with the earlier charges. Pet. App. 11a-12a. The court of appeals expressed concern about "the practice of charging aliens with overstaying when they remain in the United States to defend themselves in removal proceedings," *id.* at 12a, but ultimately declined to decide the overstay issue because it upheld the other deportability findings against petitioner. *Ibid.*

5. On April 14, 1999, on the basis of an independent review of the record, the BIA upheld the immigration judge's finding of deportability and denial of discretionary relief. Pet. App. 14a-28a. In response to numerous allegations by petitioner of Fourth Amendment, statutory, and due process violations, the BIA voluntarily excluded the testimony of Inspector Labier and Agent Boocock from its consideration. *Id.* at 25a n.6. Accordingly, the BIA did not address on the merits the allegations of improper official conduct.

In support of the finding of deportability for not having been a bona fide visitor, the BIA noted that petitioner had admitted to essentially living continuously in the United States since 1987, to overstaying her non-immigrant visas during that period, and to working without authorization in the United States almost continuously during that period despite her visitor status. Pet. App. 21a-25a. The BIA also referred to petitioner's "vague and conflicting allegations with regard to where she intended to reside following her most recent entry," *id.* at 22a, and the BIA determined that petitioner's decision not to leave the United States until her then–fiancé's divorce from his former wife—a date still uncertain at the time of her last entry—was indicative of an intent to remain in the United States, *ibid.* The BIA ultimately found lacking in credibility petitioner's testimony regarding the couple's intention to sell the house in Vermont and leave the United States, especially since the house was not put up for sale until after her immigration problems began. In this regard, the BIA further noted that Mr. Westover's house in New York had not been sold. *Id.* at 23a-24a.

Regarding the denials of discretionary adjustment of status and voluntary departure, the BIA again referred

to the facts underlying its determination that she was deportable. The BIA also noted that, although petitioner had stated she was attempting to pay her back taxes, she had not even inquired into the procedure for obtaining a Social Security number. The BIA acknowledged petitioner's marriage to a United States citizen, but also observed that the couple had married after deportation proceedings began, with knowledge that petitioner might be deported. Because petitioner offered no evidence of other familial ties in the United States, the BIA found that the equity stemming from her marriage was outweighed by numerous negative factors (overstay, work history, failure to pay taxes), and that the immigration judge therefore had not erred in denying discretionary relief. Neither the BIA nor the immigration judge considered as a negative factor the May 1992 seizure of marijuana at petitioner's home. Pet. App. 25a-27a.

6. On June 9, 1998, the court of appeals affirmed the order of the BIA. Pet. App. 1a-13a. Regarding petitioner's attacks on the legitimacy of the proceedings, the court determined that, "[e]ven though the search of her fiancé's home violated the Fourth Amendment, this is not a basis upon which she can attack the validity of her removal proceedings that resulted from an illegal search." *Id.* at 6a-7a (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984)). The court specifically noted that "[a]n alien may be able to challenge the use of illegally seized evidence, but only if the seizure constituted an 'egregious' violation of the Fourth Amendment." *Id.* at 7a (citing *Lopez-Mendoza*, 468 U.S. at 1050-1051). Since the BIA had affirmed the immigration judge's decision without relying on the testimony of Inspector Labier and Agent Boocock, however, the court had no occasion to determine

whether such a challenge could be successful, either in general or on the specific facts of this case. *Ibid.*

Petitioner also claimed in the court of appeals that her warrantless arrest violated 8 U.S.C. 1357(a)(2) (1994 & Supp. IV 1998), which provides that an INS officer "shall have power without warrant * * * to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States [unlawfully] and is likely to escape before a warrant can be obtained for his arrest." The court of appeals noted that "it appears from the record that [this] claim is most likely valid." Pet. App. 7a. The court stated that, although the seized marijuana gave the INS agents cause for believing that petitioner might be deportable on drug-related grounds, the government had not demonstrated any basis for believing that she was likely to escape. However, "[g]iven that Fourth Amendment violations do not constitute grounds for invalidating removal proceedings," the court concluded that "this mere 'statutory', argument on similar grounds cannot give [petitioner] a basis for relief." *Id.* at 8a (citing *Katris* v. *INS*, 562 F.2d 866, 869 (2d Cir. 1977)). The court declined to determine whether evidence obtained directly from a statutorily invalid arrest should be admitted in an alien's deportation hearing, because the BIA had not considered any evidence or statements from the time of petitioner's arrest by the INS. *Ibid.* The court of appeals also upheld on the merits the BIA's finding of deportability for excludability at entry, *id.* at 12a-13a, and its denial of discretionary relief, *id.* at 13a.

ARGUMENT

Petitioner contends (Pet. 6) that the evidence of her deportability for not being a bona fide visitor should

have been suppressed because (a) in Terence Westover's criminal proceedings, a federal judge determined that the seizure of marijuana at the couple's home violated the Fourth Amendment, and (b) petitioner's arrest by INS officers allegedly violated her own statutory or Fourth Amendment rights.[2]

1. The court of appeals correctly held that the Fourth Amendment and 8 U.S.C. 1357(a)(2) (1994 & Supp. IV 1998) are not implicated in this case, because "the BIA affirmed the decision of the [immigration judge] without relying on the testimony of the two INS officers," Pet. App. 7a—which was the only fruit of the illegal search or the allegedly illegal arrest.[3] The BIA

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[2] Actually, while petitioner contends that her own arrest by INS officers violated 8 U.S.C. 1357(a)(2) (1994 & Supp. IV 1998), it is not clear whether she also contends that her arrest violated the Fourth Amendment. The government will assume for purposes of this brief in opposition that she does intend to present the latter contention.

[3] Petitioner argues in passing (Pet. 3) that the court of appeals "made an erroneous assumption [that] the passport, I-94 (entry document) and [petitioner's] involuntary testimony was not excluded by the BIA." Presumably, petitioner means to argue that the court of appeals erroneously assumed that those items had been excluded by the BIA. Certiorari would not be warranted to correct an incorrect assumption by the court of appeals regarding the record in this case. But in any event, the court of appeals did not make the error petitioner apparently asserts.

With respect to petitioner's passport, we have been unable to find any record of the admission of petitioner's passport in her deportation proceedings or of any objection by petitioner to the admissibility of that document. With respect to the I-94 form, petitioner did not object to its introduction at the deportation proceedings (and mentioned her objection only in a two-sentence passage in her reply brief in the court of appeals), presumably because whatever information it contained could easily have been supplied from INS files. Therefore, petitioner has not preserved

voluntarily excluded from consideration Agent Boocock's testimony about petitioner's statements at the time of her arrest concerning her intent to remain in the United States.[4] The seized marijuana plants were not used against her; nor were they relevant to her deportability, given that she was charged with intending at entry to violate her nonimmigrant visitor visa, not with drug possession or use. In short, petitioner's deportability was established by her own testimony at the deportation hearing, as well as by other evidence not relating to the search and arrest. Accordingly, this case does not present any question concerning whether evidence gathered as a result of a violation of the Fourth Amendment or 8 U.S.C.

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any objection to the introduction of the I-94 form. With respect to petitioner's allegedly "involuntary" testimony, there was no such testimony. The Fifth Amendment privilege applies to compelled testimonial self-incrimination, and an alien accordingly has no privilege to refuse to give testimony that would not incriminate her, but would merely result in her deportation. See *Lopez-Mendoza*, 468 U.S. at 1039 (citing *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 157 (1923), as holding "involuntary confessions admissible at deportation hearing"). Moreover, petitioner did not assert any claim of a Fifth Amendment privilege at her deportation proeedings, nor did she claim that her testimony during those proceedings was involuntary. Accordingly, no question regarding the admissibility of "involuntary" testimony is before the Court on this petition.

[4] As the court of appeals noted (Pet. App. 7a n.5), there was no apparent need for the BIA to exclude Inspector Labier's testimony regarding statements made by petitioner to him at the Vermont Port of Entry, since petitioner did not allege that any constitutional violation occurred there.

1357(a)(2) (1994 & Supp. IV 1998) is admissible in deportation proceedings.[5]

Even if the finding that petitioner is deportable had rested on evidence derived from the asserted violations of the Fourth Amendment or 8 U.S.C. 1357(a)(2) (1994 & Supp. IV 1998), it would still be entitled to affirmance under settled legal principles. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), this Court held that the Fourth Amendment exclusionary rule does not apply in deportation proceedings. *Id.* at 1034. That holding is sufficient to permit the introduction into evidence at petitioner's deportation proceeding of any fruits of a Fourth Amendment violation.

A plurality of the Court in *Lopez-Mendoza* did note that the Court in that case "d[id] not deal with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." 468 U.S. at 1050-1051. This case, however, does not fall within any such possible exception to *Lopez-Mendoza*, because whatever violations occurred in this case were not "egregious." Although the

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[5] Petitioner argues (Pet. 12-13) that the court of appeals erred in refusing to invalidate the deportation proceedings because of the asserted violation of 8 U.S.C. 1357(a)(2) (1988). As the court of appeals explained, "[g]iven that Fourth Amendment violations do not constitute grounds for invalidating removal proceedings," the "mere statutory argument on similar grounds" under 8 U.S.C. 1357(a)(2) (1994 & Supp. IV 1998) "cannot give [petitioner] a basis for relief." Pet. App. 8a. Invalidating the deportation proceeding as the remedy for an alleged statutory violation would amount in effect to suppressing the body of the alien herself. As this Court held in *Lopez-Mendoza*, however, "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." 468 U.S. at 1039.

court of appeals suggested that her arrest without a warrant violated 8 U.S.C. 1357(a)(2) (1994 & Supp. IV 1998) (and, petitioner apparently argues, the Fourth Amendment) because of a lack of evidence that she was likely to escape, there is no reason to believe that any such violation was deliberate or otherwise involved what could be termed "egregious" circumstances. Contrary to petitioner's suggestion (Pet. 7, 11), that conclusion is consistent with the Ninth Circuit's decision in *Orhorhaghe* v. *INS*, 38 F.3d 488, 503-504 (1994). In *Orhorhaghe*, the court of appeals found the Fourth Amendment violation to have been "egregious" because, *inter alia*, agents had initially targeted the alien for investigation based on the "racial" factor of his "Nigerian-sounding name." *Ibid.* No such factor was present here.[6]

2. Petitioner argues (Pet. 11) that her testimony at the deportation hearing should have been suppressed as a "fruit" of the allegedly illegal search and arrest, and that the court of appeals' failure to require such exclusion conflicts with the Ninth Circuit's decision in *Orhorhaghe*. In *Orhorhaghe*, the alien claimed that his passport and immigration records should be suppressed because they were seized as the fruit of an "egregious" Fourth Amendment violation, and that a deportation decision that had made use of those records accordingly had to be reversed. 38 F.3d at 490. The government argued in *Orhorhaghe* that the alien's own admissions

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[6] Moreover, neither the knock-and-announce rule nor the statutory requirement that a warrantless arrest by INS agents be justified by sufficient ground to believe that imminent escape is likely in any way could be said to have "undermine[d] the probative value of the evidence obtained." *Lopez-Mendoza*, 468 U.S. at 1050-1051.

in his briefs to the court of appeals independently established his deportability. The court found, however, that the alien's brief to the court had not admitted facts sufficient to carry the government's burden of proving that he had overstayed his visa. *Id.* at 505. Having reached that conclusion, the court then added in a footnote that, in any event, "the admission [in the alien's brief] is also a fruit of the unlawful search and seizure, because [the alien] made the admission only in order to defend against the seizure." *Id.* at 505 n.27.

Regardless of whether the Ninth Circuit's holding in *Orhorhaghe* is correct, the First Circuit's decision in this case does not conflict with it. Petitioner's incriminating admissions at her deportation hearing were unrelated to the May 1992 search and arrest upon which she predicates her claims of Fourth Amendment and statutory violations. Unlike in *Orhorhaghe*, her admissions were not made "in an effort to defend against" an illegal search or seizure whose fruits were used in a deportation proceeding against her. Instead, her admissions were made either in an effort to establish that she did not intend to remain in the United States when she obtained her visa in March 1992 or in an effort to obtain adjustment of status notwithstanding her deportability. Accordingly, *Orhorhaghe* does not indicate that the Ninth Circuit would have suppressed petitioner's testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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